FILED MARCH 7, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **KENNETH MATTHEW COOKE,** **Member No. 159341,** A Member of the State Bar.	)	Case Nos.: **10-O-10327-LMA** (10-O-10328; 11-O-11700); 11-O-17502 (11-O-17556); 12-O-12059 (Cons.) **DECISION AND FURTHER ORDERS**

Introduction[1]

In this disciplinary matter, respondent **Kenneth Matthew Cooke** stipulated to culpability in seven counts of professional misconduct including failing to communicate with clients (two counts), failing to refund unearned fees (three counts), failing to account, and failing to competently perform legal services. Respondent and the Office of the Chief Trial Counsel of the State Bar of California (State Bar) entered into a stipulation of facts and conclusions of law. That stipulation, however, was subsequently returned by the California Supreme Court for further consideration of the recommended discipline in light of the applicable attorney discipline standards.

While the parties remained bound by the facts and conclusions of law contained within the stipulation, they were permitted to add supplemental evidence at trial. This matter was also consolidated with an additional notice of disciplinary charges (NDC) filed on September 4, 2012.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

As illustrated below, the court finds respondent culpable of the alleged misconduct. Based on the nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, and in light of the attorney discipline standards and case law, this court recommends that respondent be suspended for six months and/until payment of restitution.

Significant Procedural History

On August 30, 2011, the State Bar filed an NDC in case nos. 10-O-10327 (10-O-10328; 11-O-11700). Respondent filed a response on October 3, 2011. In December 2011, respondent and the State Bar signed a Stipulation Re Facts, Conclusions of Law and Disposition in this matter. The stipulation included two additional investigation matters (case nos. 11-O-17502 and 11-O-17556).

The State Bar Court approved the stipulation, and it was filed on January 4, 2012. On June 21, 2012, however, the Supreme Court issued order no. S200189, returning the stipulation "for further consideration of the recommended discipline in light of the applicable attorney discipline standards. (*In re Silverton* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)"

On September 4, 2012, the State Bar filed a second NDC in case no. 12-O-12059. This matter was subsequently consolidated with the aforementioned matters.

On September 14, 2012, the State Bar submitted a motion requesting that the court issue an order permitting limited modification of the returned stipulation or withdrawal from the stipulation. On September 17, 2012, the court denied the motion, but informed the parties that it would allow them to supplement the facts in the stipulation with additional facts at trial, provided the additional facts would not contradict the facts in the stipulation.

The State Bar was represented by Deputy Trial Counsels Mia R. Ellis and Katherine Kinsey. Respondent was represented by Scott J. Drexel.

Trial commenced on October 4, 2012. The first two days of trial focused on the matters contained in the stipulation. The next three days of trial, December 11, 12, and 13, 2012, pertained to case no. 12-O-12059. This consolidated matter was submitted for decision on December 13, 2012.[2]

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 15, 1992, and has been a member of the State Bar of California at all times since that date.

Case No. 10-O-10327 – The Cruz Matter

Facts

On May 12, 2009, Olga Cruz (Cruz) retained respondent to file a Chapter 7 bankruptcy matter. In May 2009, Cruz paid respondent $1,200 in advanced fees.

From September 2009 through October 2009, Cruz called respondent's office on several occasions. Cruz left messages with respondent's office staff, requesting a status update. Neither respondent nor his office staff gave her a specific or reasonable status update.

In or about November 2009, Cruz went to respondent's office and requested a refund. Respondent received the request, but did not provide a refund. Respondent failed to file the Chapter 7 petition for Cruz or take any legal action on behalf of Cruz.

On December 14, 2009, Cruz filed a Chapter 7 petition in pro per. Respondent did not earn the $1,200 fee paid by Cruz. On December 15, 2011, respondent signed a stipulation where he agreed to refund the unearned $1,200 fee to Cruz, with interest accruing beginning December 14, 2009.

[2] Another NDC was filed on December 17, 2012, after the submitted date. That NDC is not addressed in this decision.

Respondent did not return the unearned fee until the first day of trial on October 4, 2012. On October 4, 2012, respondent returned $1,200 of unearned fees to Cruz, but did not pay the interest accruing from December 14, 2009.[3]

Conclusions of Law[4]

Section 6068, subd. (m) [Failure to Communicate]

Section 6068, subdivision (m) provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. By failing to effectively communicate with Cruz regarding the status of her bankruptcy petition, respondent failed to promptly respond to reasonable status inquiries, in willful violation of section 6068, subdivision (m).

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to refund Cruz's unearned fee for nearly three years, respondent failed to promptly refund unearned fees, in willful violation of rule 3-700(D)(2).

Case No. 10-O-10328 – The Reymundo Matter

Facts

On May 22, 2009, Magdalena Reymundo (Reymundo) retained respondent to file bankruptcy on her behalf. That same day, Reymundo paid respondent $2,000 in advanced fees.

[3] As of October 4, 2012, respondent still owed interest in the amount of $359.59. This figure represents 33 months of interest on the original $1,200, at 10% per year.

[4] The NDC also alleged a violation of rule 3-110(A) in the Cruz matter. In their stipulation, the parties requested that this allegation be dismissed. Accordingly, that count is dismissed.

Between May 22 and June 1, 2009, Reymundo provided respondent with all the information required for a Chapter 13 bankruptcy petition, including proof of income and expenses, mortgage statements, and a consumer liability report. During that same time period, Reymundo sent respondent several emails, stressing the urgency of filing the bankruptcy petition as soon as possible. Respondent received Reymundo's emails, but did not effectively address her concerns.

On September 27, 2009, Reymundo informed respondent that she was prepared to file a complaint with the State Bar if he did not file her bankruptcy petition. On September 29, 2009, respondent filed a Chapter 13 petition on behalf of Reymundo, case no. 09-14684-PB 13 (the Reymundo matter).

On October 30, 2009, respondent appeared at the initial meeting of creditors on behalf of Reymundo. The Chapter 13 trustee (the trustee) informed respondent that he had not provided any documents evidencing proof of income for Reymundo. The trustee directed respondent to provide the requisite information for debtor's income. Respondent failed to do so.

On November 2, 2009, the trustee filed an objection to the confirmation of Reymundo's Chapter 13 plan for several reasons, including, but not limited to, the lack of profit and loss information and the lack of documentation regarding Reymundo's income. A hearing on the trustee's objections was set for April 21, 2010.

On March 12, 2010, the trustee emailed respondent in order to set an April 17, 2010 telephone conference to discuss the objections to Reymundo's Chapter 13 plan. Respondent did not respond to the trustee's email and the objections remained unresolved.

On March 26 and 29, 2010, respondent filed two motions to determine the value of real property on behalf of Reymundo. A hearing on both motions was set for June 15, 2010.

In early April 2010, the court notified respondent that the motions filed on March 26 and 29, 2010, had been improperly served, required re-service, and were rescheduled to be heard on July 27, 2010. Respondent did not notify Reymundo of the new hearing date to determine the value of the real property.

On April 20, 2010, the day before the hearing on the trustee's objections, respondent filed an amended Chapter 13 plan (the amended plan). Because of the last minute filing of the amended plan, the hearing on the trustee's objections was continued to June 16, 2010.

On June 10, 2010, the trustee filed an objection to the amended plan for several reasons, including, but not limited to the lack of documentation regarding Reymundo's income and the lack of profit and loss information.

On June 15, 2010, Reymundo appeared at the hearing on motions to determine the value of real property, unaware that it had been rescheduled to July 27, 2010. At the June 15, 2010 hearing, Reymundo indicated to the court that she could not reach respondent. Reymundo also indicated to the court that she had already provided to respondent all the documents which were responsive to the trustee's objections.

On June 15, 2010, the court scheduled an Order to Show Cause re Sanctions (OSC) for July 27, 2010. The court ordered that respondent file a response to the OSC by July 13, 2010. Respondent received the court's order but did not file a timely response.

On July 27, 2010, the day before the hearing on the motions to determine the value of real property and the OSC, respondent filed a statement of case status on behalf of Reymundo in which he also responded to the OSC. In the statement of case status, respondent explained that the untimely service of the March 26 and 29, 2010 motions was caused by staffing problems at respondent's law office. Respondent also explained that his failure to respond to Reymundo's

emails and to inform her of the rescheduling of the June 15, 2010 hearing was due to the fact that he did not have a current telephone number for Reymundo.

On July 29, 2010, Reymundo filed a substitution of attorney, terminating her representation by respondent. On January 25, 2011, the trustee and respondent stipulated to the disgorgement of all attorney's fees by respondent to Reymundo. In May 2011, respondent refunded the attorney's fees to Reymundo.

Conclusions of Law

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By delaying for four months the filing of Reymundo's petition in spite of the client's expressed urgency, and repeatedly failing to submit to the court the necessary documentation which Reymundo had provided to him, respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Case No. 11-O-11700 – The Gillengerten Matter

Facts

On November 12, 2008, Alan Gillengerten (Gillengerten) retained respondent to file a Chapter 7 bankruptcy matter. Between November 17 and December 1, 2008, Gillengerten paid respondent a total of $2,500 in advanced fees. Between November 18, 2008 and February 18, 2009, Gillengerten and respondent exchanged frequent emails and updated information.

On February 19, 2009, respondent emailed Gillengerten, confirming that he received the updated information on Gillengerten's income and expense and creditors. Respondent's email stated that he would have the petition ready for Gillengerten's review "within the next several days."

On March 27, 2009, Gillengerten emailed respondent, inquiring about the status of his petition. On March 30, 2009, respondent's office administrator, Peg Anderson (Anderson), emailed Gillengerten that respondent would "have [Gillengerten's] work done by the 15th."

Between March 30 and November 23, 2009, Anderson answered Gillengerten's multiple requests for a status update, each time acknowledging receipt of Gillengerten's emails and stating that she would email back with an update. On November 23, 2009, Anderson emailed Gillengerten that respondent "[was] working on [Gillengerten's] file today."

On November 23, 2009, respondent emailed Gillengerten, attaching a preliminary draft of the petition and requesting the latest updated information on profits and losses. On December 27, 2009 and January 12, 2010, Gillengerten emailed respondent, attaching the requested updated information. On January 12, 2010, respondent emailed Gillengerten, stating that "[he'll] look at it tomorrow."

Between January 17 and May 10, 2010, Gillengerten called respondent regarding the status of his bankruptcy matter, leaving messages to return the calls, and sent him emails requesting that respondent file the Chapter 7 petition. Respondent received the calls, but did not respond.

In July 2010, Gillengerten retained a new attorney, J. Edward Switzer, Jr. (Switzer), to file his Chapter 7 petition. On July 30, 2010, Switzer filed a petition on behalf of Gillengerten, in case no. 10-13550-PB7 (the Gillengerten matter). The Gillengerten matter was terminated and Gillengerten discharged on or about October 29, 2010.

By failing to take effective legal action on behalf of Gillengerten, respondent did not earn the $2,500 fee paid by Gillengerten. On December 15, 2011, respondent signed a stipulation where he agreed to refund the unearned $2,500 fee to Gillengerten, with interest accruing beginning July 1, 2010.

Respondent did not return the unearned fee until the first day of trial on October 4, 2012. On that day, respondent returned $2,500 of unearned fees to Gillengerten, but did not pay the interest accruing from July 1, 2010.[5]

Conclusions of Law[6]

Section 6068, subd. (m) [Failure to Communicate]

By failing to effectively communicate with Gillengerten regarding the status of his bankruptcy petition, respondent failed to respond promptly to his client's reasonable status inquiries, in willful violation of Business and Professions Code section 6068, subdivision (m).

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to promptly refund Gillengerten's unearned fee, respondent failed to promptly refund an unearned fee, in willful violation of rule 3-700(D)(2).

Case No. 11-O-17556 – The Avila Matter

Facts

On July 27, 2010, Richard Avila (Avila) hired respondent to file a bankruptcy petition, and paid respondent an $800 advanced fee. That afternoon, however, Avila changed his mind and called respondent's office, terminating respondent's services and requesting a refund of the advanced fee. After July 27, 2010, respondent did not take legal action on behalf of Avila, nor did respondent refund the $800 in unearned fees to Avila.

Avila filed a small claims action in the Imperial County Superior Court. On July 23, 2011, the court entered judgment against respondent for $830.

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[5] As of October 4, 2012, respondent still owed interest in the amount of $597.94. This figure represents 27 months of interest on the original $2,500, at 10% per year.

[6] The NDC also alleged that respondent violated rule 3-110(A) and section 6068, subdivision (i), in the Gillengerten matter. In their stipulation, the parties requested that these allegations be dismissed. Accordingly, those counts are dismissed.

On December 15, 2011, respondent signed a stipulation where he agreed to refund the $830 to Avila, with interest accruing beginning July 23, 2011. Respondent did not return the unearned fee until the first day of trial in this matter (October 4, 2012). On that day, respondent returned $830 to Avila, but did not pay the interest accruing from July 23, 2011.[7]

Conclusions of Law

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to promptly refund Avila's unearned fee, respondent failed to promptly refund an unearned fee, in willful violation of rule 3-700(D)(2).

Case No. 11-O-17502 – The Gonzalez Matter

Facts

On June 15, 2009, Hunt & Henriques, on behalf of Citibank (Citibank), filed a complaint against Norma Gonzalez (Gonzalez) entitled *Citibank N.A. v. Norma Gonzalez*, case no. 37-2009-00092085, to collect on a deficient mortgage account.

On October 21, 2009, Gonzalez retained respondent to file a bankruptcy petition. On January 18, 2010, respondent filed a bankruptcy petition on behalf of Gonzalez. On April 20, 2010, the debts were discharged in bankruptcy.

On August 3, 2010, Citibank obtained a default judgment against Gonzalez for $91,346.20. On January 27, 2011, Citibank's judgment lien was recorded against Gonzalez.

On February 21, 2011, respondent filed a complaint on behalf of Gonzalez, entitled *Norma Gonzalez v. Citibank N.A.* In February 2011, Citibank filed for a release of the judgment lien. In May, 2011, the matter settled for $5,500. Gonzalez received $1,500.

[7] As of October 4, 2012, respondent still owed interest in the amount of $97.62. This figure represents 14 months of interest on the original $830, at 10% per year.

On August 22, 2011, Gonzalez requested an accounting of the total amount of the settlement. On December 17, 2011, respondent mailed Gonzalez an accounting.

Conclusions of Law

Rule 4-100(B)(3) [Failure to Account]

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By failing to promptly provide Gonzalez with an accounting, respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

Case No. 12-O-12059 – The Castillo Matter

Facts

On December 7, 2011, Maria Castillo (Castillo) went to respondent's Calexico office and spoke, via webcam, with Jorge Espinosa, an attorney in respondent's Chula Vista office, regarding respondent handling her Chapter 7 bankruptcy. This was the first and only time Castillo had contact with an attorney in respondent's office.

On December 15, 2011, Castillo signed a retainer agreement employing respondent to file a Chapter 7 bankruptcy on her behalf (the bankruptcy matter).[8] That same day, Castillo paid respondent a $1,500 legal fee.

About a week later, respondent's office telephoned Castillo requesting additional documentation. Castillo attempted to deliver the additional documentation to respondent's office on numerous occasions, but she was never able to reach anyone at respondent's office in

[8] On this same day, respondent signed the stipulation with the State Bar in case nos. 10-O-10327, et al.

Calexico.[9] Thereafter, respondent failed to file the bankruptcy on Castillo's behalf or provide any legal services of value.

On December 27, 2011, Castillo telephoned respondent's office and left a message regarding the status of her bankruptcy matter. Respondent received the message, but did not provide a response.

On January 18, 2012, Castillo telephoned respondent's San Diego's office and left a message with "Priscilla" asking for someone to call her back regarding her bankruptcy matter. Respondent received the message, but did not provide a response.

On February 24, 2012, Castillo went to respondent's Calexico office during work hours and found the office closed. Later that day, Castillo spoke to Priscilla in respondent's San Diego office. Priscilla told Castillo that there was nothing Castillo could do to obtain the return of her file and her funds, and Castillo left a message asking to speak to a manager. However, no one from respondent's office contacted Castillo regarding her bankruptcy matter.

On March 13, 2012, attorney John Q. Goodrich (Goodrich) faxed and mailed a letter to respondent on Castillo's behalf requesting Castillo's file and a refund of the fees. In the letter, Goodrich informed respondent that Castillo had requested a refund and the return of her file without success. Respondent received the March 13, 2012 letter, but did not respond. He also did not return Castillo's file or provide a refund.

On May 31, 2012, Castillo emailed a copy of Goodrich's letter requesting her file and a refund to respondent's office. Respondent received the letter, but did not provide a refund to Castillo or release the file.

[9] During this time period, Castillo sent emails and made telephone calls to respondent's San Diego office. There is no credible evidence that respondent's office sent Castillo emails or letters, or otherwise attempted to contact her.

Respondent provided no services of value to Castillo. Respondent did not earn any of the $1,500 paid by Castillo and has not refunded any of the fees. As of the date of trial in this matter, respondent has not refunded any of the unearned fees to Castillo, has not provided Castillo with an accounting of the $1,500 in attorney's fees, and has not returned Castillo's file to her.

Conclusions of Law

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

By failing to file and pursue Castillo's bankruptcy or provide any legal services of value, respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Section 6068, subd. (m) [Failure to Communicate]

By failing to respond to Castillo's inquiries regarding her bankruptcy matter, respondent failed to respond promptly to reasonable status inquiries of Castillo, in willful violation of Business and Professions Code section 6068, subdivision (m).

Rule 3-700(D)(1) [Failure to Return Client Papers/Property]

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. By failing to release the client file to Castillo despite her requests and despite a request from Goodrich on her behalf, respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property, in willful violation of rule 3-700(D)(1).[10]

[10] Respondent testified that he hasn't returned Castillo's file because there is nothing in there that she could possibly need. Respondent's opinions regarding his former client's file do not absolve him from the requirements of rule 3-700(D)(1).

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to promptly refund to Castillo the unearned fee, respondent failed to promptly refund an unearned fee, in willful violation of rule 3-700(D)(2).[11]

Rule 4-100(B)(3) [Failure to Account]

By failing to provide an itemized accounting for the $1,500 in attorney's fees paid by Castillo, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).[12]

Aggravation[13]

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent was found culpable of twelve acts of misconduct stemming from six client matters. Multiple acts of misconduct are an aggravating factor.

Significant Harm (Std. 1.2(b)(iv).)

Respondent's misconduct resulted in significant financial harm to several of his clients, as they were denied the use of their money. The court notes that several of these clients were in a vulnerable financial position, as they were trying to file bankruptcy. Although respondent has now issued refunds to some of his clients, those refunds did not materialize until the day of trial, and did not account for interest.

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[11] Respondent argued that the fee was a flat fee and non-refundable pursuant to the fee agreement, but his Calexico office was typically closed and Castillo could not reach respondent. Respondent cannot take money, essentially close his office, and declare the fee non-refundable.

[12] Respondent cited *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, in support of his argument that he did not need to provide Castillo with an accounting. In *Brockway*, the Review Department discussed the ramifications of a true retainer, where money is paid to secure the attorney's availability over a given period of time, rather than for the performance of legal services. Here, respondent was hired to file a Chapter 7 bankruptcy, his office was typically closed, and he didn't communicate with Castillo. Clearly, Castillo had not secured respondent's availability.

[13] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Indifference (Std. 1.2(b)(v).)

After stipulating to the misconduct in the Cruz, Reymundo, Gillengerten, Avila, and Gonzalez matters, respondent committed additional misconduct in the Castillo matter. The fact that respondent continued to commit similar misconduct after entering into the disciplinary stipulation with the State Bar is concerning. That being said, respondent had yet to have the opportunity to complete any of his probation obligations, which are designed to rehabilitate the attorney and to protect the public from similar future misconduct. (See *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) Consequently, the court assigns nominal weight in aggravation.

Mitigation

No Prior Record of Discipline (Std. 1.2(e)(i).)

Respondent had practiced law in California for over 17 years prior to the commencement of the instant misconduct. During that span, he had no prior record of discipline. Respondent's tenure of discipline-free practice is entitled to significant weight in mitigation. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than ten years of discipline-free practice entitled to significant weight].)

Cooperation with the State Bar (Std. 1.2(e)(v).)

Respondent cooperated with the State Bar's investigation and entered into a stipulation as to facts and conclusions of law. Respondent's cooperation with the State Bar warrants consideration in mitigation.

While the court also acknowledges that respondent made restitution (without interest) to some of his clients, payment of restitution on the day of trial does not warrant consideration in mitigation. (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [restitution paid under threat of disciplinary proceedings does not have any mitigating effect].)

Good Character (Std. 1.2(e)(vi).)

Respondent presented testimony from seven character witnesses, including three attorneys, who were aware of his misconduct (to differing degrees) and attested to his honesty, integrity, and good character. This evidence warrants consideration in mitigation.

Respondent also presented evidence of his volunteer community activities and pro bono work. Respondent has been involved with the San Diego Human Dignity Foundation for about ten years. Respondent has also worked with the Chamber of Commerce and Landmark Forum Education; however, his involvement with these two organizations has been more focused on personal and professional development. In addition, respondent received an award from the San Diego Volunteer Lawyers Project for his pro bono service in the 1990's.

Extreme Emotional, Financial, and Physical Difficulties (Std. 1.2(e)(iv).)

Respondent testified regarding emotional, financial, and physical difficulties he has been suffering from, including a recent heart attack. While the court is sympathetic to respondent's situation, the lack of expert testimony on this subject, coupled with the fact that much of the present misconduct occurred before respondent's April 2011 heart attack, precludes any more than nominal weight in mitigation.

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.2(b), 2.4(b), 2.6, and 2.10.) Standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions."

Standard 2.6 provides that culpability of a member of a violation of section 6068 shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. Standard 2.4(b) states that, "culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." Standard 2.10 provides that culpability of a member of a violation of rule 3-700 shall result in reproval or suspension according to the gravity of the offense or the harm, if any, to the victim. And standard 2.2(b) states that a violation of rule 4-100 warrants a three-month actual suspension, irrespective of mitigating circumstances.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51

Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton, supra*, 36 Cal.4th at p. 92.)

The State Bar requested that respondent be actually suspended for six months and/until he makes full restitution. Respondent, on the other hand, argued that any period of actual suspension should not exceed 30 days. The court looked to the case law for guidance and found *King v. State Bar* (1990) 52 Cal.3d 307, and *Lester v. State Bar* (1976) 17 Cal.3d 547, to be instructive.

In *King*, the attorney abandoned two clients, failed to forward their files promptly to successor counsel, and gave false assurances to one of the clients regarding the status of his case. The attorney demonstrated a failure to accept responsibility for his actions and to appreciate the severity of his misconduct. The attorney's misconduct also resulted in an $84,000 default judgment against his client. In mitigation, the attorney had no prior record of discipline. Additionally, he was experiencing depression and financial difficulties, and was going through a marital dissolution. The Supreme Court ordered that the attorney be suspended for four years, stayed, with four-years' probation, and three-months' actual suspension.

In *Lester*, the Supreme Court ordered that the attorney be suspended for six months actual for failing to perform legal services with competence and failing to refund unearned fees. This matter involved four client matters. In aggravation, some of the attorney's testimony lacked candor. The attorney also did not demonstrate remorse or insight into the misconduct. No mitigating factors were identified.

The present matter involves more client misconduct than *Lester*; however, it also contains less aggravation. And similar to *King*, the present case involves significant mitigation. After balancing the present misconduct with the aggravating and mitigating factors, the court finds a period of actual suspension similar to *Lester* to be most appropriate. Therefore, the court

recommends, among other things, that respondent be actually suspended from the practice of law for six months and/until he makes restitution.

Recommendations

Accordingly, it is recommended that respondent **Kenneth Matthew Cooke**, State Bar Number 159341, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of two years[14] subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first six months of probation, and he will remain suspended until the following requirements are satisfied:

    i. Respondent must make restitution to Olga Cruz in the amount of $359.59 plus 10 percent interest per year from October 4, 2012;

    ii. Respondent must make restitution to Alan Gillengerten in the amount of $597.94 plus 10 percent interest per year from October 4, 2012;

    iii. Respondent must make restitution to Richard Avila in the amount of $97.62 plus 10 percent interest per year from October 4, 2012;

    iv. Respondent must make restitution to Maria Castillo in the amount of $1,500 plus 10 percent interest per year from December 15, 2011; and

    v. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirements, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

    Respondent must furnish proof of all restitution to the State Bar's Office of Probation in Los Angeles and must reimburse the Client Security Fund, to the extent of any payment from the fund to the aforementioned recipients, in accordance with Business and Professions Code section 6140.5).

2. Respondent must also comply with the following additional conditions of probation:

[14] The probation period will commence on the effective date of the Supreme Court's order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

i. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California;

ii. Respondent must submit written quarterly reports to the State Bar's Office of Probation (Office of Probation) on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, the report must be submitted on the next following quarter date, and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probationary period;

iii. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;

iv. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

v. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request; and

vi. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

3. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of respondent's suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order

The order filed on January 4, 2012, approving the parties' Stipulation Re Facts, Conclusions of Law and Disposition, in the above-entitled matter is hereby **VACATED**.

The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving, which was filed on January 4, 2012, is hereby converted to a stipulation as to facts and conclusions of law only, and State Bar Court staff is directed to remove the Stipulation Re Facts,

Conclusions of Law and Disposition and Order Approving, filed on January 4, 2012, from the State Bar's website.

Dated: March _____, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court